

A Sen Media Sdn Bhd v Perunding Pakar Media Sdn Bhd & Ors

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-01(NCC)(W)-29-01 OF 2013
ZAHARAH IBRAHIM, AZAHAR MOHAMED, ABDUL AZIZ AB
RAHIM JJCA
28 SEPTEMBER 2015

C *Civil Procedure — Appeal — Appellate intervention — Lack of judicial appreciation by the judge resulting in defendant being prejudiced — Whether a serious error warranting appellate intervention*

D *Civil Procedure — Pleadings — Issue not pleaded — Failure to plead invalidity of contract — Court not to decide on issue not pleaded*

E *Public Authorities — Statutory body — Breach of contract — National Sports Council of Malaysia failing to pay for services obtained under contract — Whether payment made in breach of treasury instructions — Whether issue of treasury instructions an internal matter not affecting contractual obligation of parties — Whether no power to enter into any contract — Whether valid contract established*

F The first respondent/plaintiff and the appellant/defendant were media companies. The defendant carried on the business of selling 'time slots' for advertisements to its clients who wished to advertise their products/services in all forms of media. The plaintiff provided to the defendant 'media services',
G meaning the plaintiff placed and paid for 'advertisement placements/bookings' in the print and electronic media for the defendant. The plaintiff sued the defendant for unpaid media services rendered. The defendant failed to pay the plaintiff because it did not receive payment from the third respondent/second third party. The defendant thus commenced third party proceedings against
H the second third party to be indemnified by the second third party. The defendant asserted that it had a contract (the media plans) with the second third party for the supply of media services. The crux of the defendant's case was that it had obtained the media contract from the second third party and in turn, it had appointed the plaintiff to place and secure the bookings in the print
I and electronic media for the second third party. The defendant failed to pay the balance sum to the plaintiff for the media services rendered for the benefit of the second third party. In dismissing the defendant's claim against the second third party, the High Court held that the earlier payments made by the second third party to the defendant was made in breach of treasury instructions and

that there was no proper written contract with the second third party. The defendant appealed against the High Court's decision.

Held, allowing the defendant's appeal with no order as to costs against the second third party:

- (1) The second third party had agreed to the media plans which were proposed by the defendant. The second third party was a statutory body established under the provisions of the National Sports Council of Malaysia Act 1971 (Act 29). The second third party had the power to enter into any contract. The then Director-General of the second third party had signed and approved the media plans on behalf of the second third party. The second third party had received the benefits of the media services rendered by the plaintiff on behalf of the defendant (see para 22).
- (2) The learned High Court judge fell into error and erred in law when he decided that there was no valid contract between the defendant and the second third party. This indicated a lack of judicial appreciation on the part of the learned High Court judge resulting in the defendant being prejudiced. There was a serious error warranting appellate intervention (see para 26).
- (3) The second third party never pleaded in its defence that there was a breach of treasury instructions. It was also never pleaded that as a result of such breach, the contract was invalidated. It is a well-settled legal principle that the court should not decide on an issue that was not pleaded by the parties (see para 28).
- (4) The issue of treasury instructions was an internal matter of the second third party and hence the non-compliance by the second third party, if any, bore no bearing on the contractual obligation of the parties. Failure on the part of second third party to comply with the treasury instructions did not in any manner invalidate a contract that the defendant had entered into; the treasury instructions could not possibly bind the defendant; *Macrotac Enterprise & Ors v Pengarah Pendidikan Negeri Selangor* [2009] MLJU 1262 (referred); *Pengarah Pelajaran Wilayah Persekutuan & Ors v Loot Ting Yee* [1982] 1 MLJ 68 (referred) (see para 29).
- (5) It was never proven during the trial that the defendant was aware of any breach of the provisions of the treasury instructions. There is no reason for the defendant to think that the second third party had not complied with its own internal procedures on payment when in fact the second third party had been making consistent payments to the defendant from June 2007 to February 2009 (see para 30).

A [Bahasa Malaysia summary]

Responden pertama/plaintif dan perayu/defendan adalah syarikat media. Defendan menjalankan perniagaan menjual 'time slot' untuk pengiklanan kepada pelanggan yang mahu mengiklankan produk/perkhidmatan dan semua bentuk media. Plaintif memberikan kepada defendan 'media services', bererti
B plaintif menempah dan membayar untuk 'advertisement placements/bookings' dalam bentuk media cetak dan elektronik untuk defendan. Defendan menyaman plaintif untuk perkhidmatan media yang belum dibayar yang diberikan. Defendan gagal untuk membayar plaintif
C kerana ia tidak menerima pembayaran daripada responden ketiga/ pihak ketiga kedua. Defendan dengan itu memulakan prosiding pihak ketiga terhadap pihak ketiga kedua untuk dipampas oleh pihak ketiga kedua. Defendan menegaskan bahawa ia mempunyai kontrak (media plans) dengan pihak ketiga kedua bagi pembekalan perkhidmatan media. Masalah pokok dalam kes
D defendan adalah bahawa ia telah memperolehi kontrak media daripada pihak ketiga kedua dan kemudiannya, ia telah melantik plaintif untuk menempahkan dan menjamin tempahan dalam media cetak dan elektronik untuk pihak ketiga kedua. Defendan gagal untuk membayar jumlah baki kepada plaintif untuk perkhidmatan media yang diberikan untuk faedah pihak
E ketiga kedua. Dalam menolak tuntutan defendan terhadap pihak ketiga kedua, Mahkamah Tinggi memutuskan bahawa bayaran terdahulu dibuat oleh pihak ketiga kedua kepada defendan dilakukan dalam pelanggaran kepada arahan perbendaharaan dan bahawa tiada kontrak bertulis secara betul dengan pihak ketiga kedua.

F **Diputuskan**, membenarkan rayuan defendan tanpa perintah terhadap kos terhadap pihak ketiga kedua:

- G** (1) Pihak ketiga kedua telah bersetuju kepada media plans yang telah dicadangkan oleh defendan. Pihak ketiga kedua adalah badan berkanun yang ditubuhkan di bawah proviso Akta Majlis Sukan Negara 1971 (Akta 29). Pihak ketiga kedua mempunyai kuasa untuk memasuki apa-apa kontrak. Ketua Pengarah pihak ketiga kedua terdahulu telah menandatangani dan meluluskan *media plans* bagi pihak ketiga kedua. Pihak ketiga kedua telah menerima faedah perkhidmatan media yang
H diberikan oleh plaintif bagi pihak defendan (lihat perenggan 22).
- (2) Yang Arif hakim Mahkamah Tinggi terkhilaf dan terkhilaf di sisi undang-undang apabila dia memutuskan bahawa tiada kontrak sah antara defendan dan pihak ketiga kedua. Ini menunjukkan kekurangan penilaian penghakiman pada bahagian YA hakim Mahkamah Tinggi
I mengakibatkan defendan diprejudiskan. Terdapat kekhilafan serius yang mewajarkan campur tangan mahkamah rayuan (lihat perenggan 26).
- (3) Pihak ketiga kedua tidak pernah memplidkan dalam pembelaan mereka bahawa terdapat pelanggaran arahan perbendaharaan. Ia juga tidak

diplidkan akibat daripada pelanggaran itu, kontrak menjadi tidak sah. Adalah menjadi prinsip undang-undang yang jelas bahawa mahkamah tidak sepatutnya membuat keputusan terhadap isu yang tidak diplidkan oleh pihak-pihak (lihat perenggan 28).

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- (4) Isu arahan perbendaharaan adalah perkara dalaman pihak ketiga kedua dan oleh itu ketidakpatuhan oleh pihak ketiga kedua, sekiranya ada, tidak mempunyai apa-apa kesan terhadap kewajipan kontrak pihak-pihak. Kegagalan di pihak ketiga kedua mematuhi arahan perbendaharaan tidak dalam apa-apa cara membatalkan kontrak yang dimasuki defendan; arahan perbendaharaan tidak mungkin dapat mengikat defendan. *Macrotac Enterprise & Ors v Pengarah Pendidikan Negeri Selangor* [2009] MLJU 1262 dirujuk; *Pengarah Pelajaran Wilayah Persekutuan & Ors v Loot Ting Yee* [1982] 1 MLJ 68 dirujuk (lihat perenggan 29).

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- (5) Ia tidak pernah dibuktikan sewaktu perbicaraan bahawa defendan menyedari apa-apa pelanggaran terhadap proviso arahan perbendaharaan. Tiada sebab untuk defendan memikirkan bahawa pihak ketiga kedua tidak mematuhi prosedur dalamannya sendiri berkaitan pembayaran apabila pihak ketiga kedua telah membuat bayaran secara konsisten kepada defendan dari Jun 2007 hingga Februari 2009 (lihat perenggan 30).]

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Notes

For cases on appellate intervention, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 1019–1020.

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For cases on issue not pleaded, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 7105–7123.

For cases on statutory body in general, see 10(2) *Mallal's Digest* (5th Ed, 2015) paras 2080–2089.

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Cases referred to

Fitzpatrick Contractors Ltd v Tyco Fire and Integrated Solutions (UK) Ltd [2008] EWHC 1301, QBD (refd)

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Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)

Macrotac Enterprise & Ors v Pengarah Pendidikan Negeri Selangor [2009] MLJU 1262; [2010] 8 CLJ 592, HC (refd)

Pengarah Pelajaran Wilayah Persekutuan & Ors v Loot Ting Yee [1982] 1 MLJ 68, FC (refd)

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Trentham (G Percy) v Archital Luxfer Ltd [1993] 1 Lloyd's Rep 25; [1993] 63 BLR 44; [1992] BLM (December) 5, CA (refd)

Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152; [1990] 1 CLJ (Rep) 330, SC (refd)

A Legislation referred to

Contracts Act 1950 s 8

National Sports Council of Malaysia Act 1971

B Appeal from: Suit No D-22NCC-3–2011 (High Court, Kuala Lumpur)

Firoz Hussein bin Ahmad Jamaluddin (Mohd Hafarizam bin Harun, Cheng Mai and Muhammad Asmirul Asraf bin Fadil with him) (Hafarizam Wan & Aisha Mubarak) for the appellant.

Ragumaren Gopal (G Ragumaren & Co) for the first respondent.

C *Nik Mohd Noor (Cynthia Noor Hazean with him) (Senior Federal Counsel, Attorney General's Chambers) for the second respondent.*

Ahmad Shahrir bin Mohd Salleh (Ramli, Shahrir & Tajul) for the third respondent.

D Azahar Mohamed JCA:

E [1] In the High Court, the first respondent, Perunding Pakar Media Sdn Bhd (the plaintiff in the High Court), brought a writ action against the appellant, Sen Media Sdn Bhd (the defendant in the High Court), for unpaid media services rendered in the sum of RM2,554,143.62.

F [2] The appellant in turn had successfully applied by way of third party proceedings to add two third parties to the first respondent's writ action, namely the second respondent, the Government of Malaysia (the first third party in the High Court), and the third respondent, Majlis Sukan Negara Malaysia (the second third party in the High Court).

G [3] We shall be referring to parties in this judgment in the capacity as they were in the High Court.

[4] After a full trial, the High Court allowed the plaintiff's claim against the defendant for damages in the sum of RM2,523,651.62 with interest of 5%pa from date of judgment until full satisfaction and costs.

H [5] As for the first and second third parties, the High Court held that the defendant failed to establish its case against both the first and second third parties and therefore the High Court dismissed the third party claim against them.

I [6] Aggrieved by the decision of the High Court, the defendant filed an appeal to this court, naming the plaintiff, the first third party and the second third party as first, second and third respondents respectively. The plaintiff cross-appealed on the limited issue of the interest awarded by the High Court.

[7] We heard all the appeals together. At the conclusion of the hearing of the appeals, by a unanimous decision, we: **A**

- (a) dismissed the defendant's appeal against the plaintiff and the first third party with no order as to costs;
- (b) allowed the defendant's appeal against the second third party; and **B**
- (c) dismissed the plaintiff's cross-appeal with no order as to costs.

[8] Following our decision, the second third party had filed an application for leave to appeal to the Federal Court. **C**

[9] We now give our reasons for allowing the defendant's appeal against the second third party.

[10] The outline background facts of the case concerning the defendant and the second third party are as follows. The plaintiff and the defendant are media companies. The defendant carried on the business of selling 'time slots' for advertisements to its clients who wish to advertise their products/services in all forms of media. The defendant appointed the plaintiff as the media agency to purchase the timeslots for this purpose. The plaintiff provided to the defendant 'media services', meaning the plaintiff placed and paid for 'advertisement placements/bookings' in the print and electronic media for the defendant. For the media services rendered, the plaintiff enjoyed agency commissions, which constituted its profits. **D**
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[11] The plaintiff sued the defendant for unpaid media services rendered. The defendant failed to pay the remaining sum claimed by the plaintiff because it did not receive the payment from the second third party.

[12] The defendant then commenced third party proceedings against the second third party; this was essentially a claim by the defendant to be indemnified by the second third party. To this end, the defendant asserted that it had a contract with the second third party for the supply of media services. The defendant contended that the media plans were the basis of the contract with the second third party. **G**
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[13] The crux of the defendant's case was that it had obtained the media contract from the second third party and in turn, it had appointed the plaintiff to place and secure the bookings in the print and electronic media for the second third party. The plaintiff would then invoice the defendant for the media services rendered. **I**

[14] The dispute in this case arose when the defendant failed to pay the

- A balance sum to the plaintiff for the media services rendered for the benefit of the second third party. As we have said earlier, the defendant's failure was because it did not receive payments from the second third parties.
- B [15] It is necessary to make the point that the defendant claimed to be indemnified by the second third party in the event the court found liability against it as against the plaintiff.
- C [16] The defendant's claim against the second third party is condensed in para 3 of the defendant's amended statement of claim against the third parties:
- D 3 Defendan telah pun memfailkan Pernyataan Pembelaan pada 26.1.2011, sesalihan yang sama telah diserahkan kepada Pihak Ketiga dan Pihak ketiga Kedua, di mana dakwaan Plaintiff adalah dinafikan dan Defendan seterusnya menyatakan seperti berikut:
- E (i) Defendan terlibat dalam bidang media di mana Defendan akan menjual 'slot' masa untuk pengiklanan kepada klien Defendan yang ingin mengiklankan produk/servis mereka antara lain di media elektronik, suratkhbar, majalah, radio dan televisyen.
- F (ii) Defendan telah dilantik oleh Kementerian Belia dan Sukan Malaysia [KBS] untuk mengiklankan aktiviti-aktiviti KBS antara lain di media elektronik seperti televisyen dan suratkhbar melalui surat bertarikh 25.5.2007.
- G (iii) Defendan telah melantik Plaintiff sebagai agensi media yang membeli 'slot' masa untuk KBS melalui surat bertarikh 27.2.2007.
- H (iv) Adalah dipersetujui antara Defendan dan Plaintiff bahawa Plaintiff hanya akan dibayar selepas penerimaan bayaran daripada KBS sahaja dan bukan sebelum dan/atau bila diminta/dituntut oleh Plaintiff dan perkara ini dalam pengetahuan Plaintiff pada semua masa yang material.
- I (v) Defendan telah dilantik oleh Majlis Sukan Negara Malaysia [MSN] untuk mengiklankan aktiviti-aktiviti MSN antara lain di media elektronik seperti televisyen dan suratkhbar melalui media plan bertarikh 12.2.2007, 13.3.2007 dan 17.4.2007.
- (vi) Defendan telah pada semua masa yang material menghantarserah kepada MSN inois-inois untuk kerja-kerja yang dilakukan dan/atau untuk perkhidmatan yang telah diberikan tetapi sehingga kini MSN telah gagal, enggan dan/atau ingkar untuk menyelesaikannya.
- [17] As can be seen above, the defendant's claim against the second third party was made on the basis that the media services were at the request and for the benefit of the second third party, pursuant to an agreement between the defendant and Majlis Sukan Negara/the second third party. Furthermore, the second third party had made payments to the defendant for the media services.

[18] In dismissing the defendant's claim against the second third party, the High Court held that the earlier payments made by the second third party to the defendant was made in breach of treasury instructions and that there was no proper written contract with the second third party. In the words of the learned High Court judge:

As for MSN, the evidence suggests payments were made upon the instruction of the then Minister of Youth and Sports, but these were in breach of treasury instructions. The testimony of WSTP 2(3) [Abdul Rashid bin Yaakub] is particularly clear on this. MSN as a statutory body is subject to defined financial procedures, and these will include the requirement of local orders and defined process of open tenders and negotiated contracts (where applicable). The same point is made that on the facts of this case, there is no proper written contract with MSN, and as such the payments made previously were in fact in breach of payment procedures. MSN has since refused to make further payments. I take notice that there was an investigation by Badan Pencegah Rasuah in relation to the payments made by MSN sometime at the end of 2007, and thereafter, according to Abdul Rashid, he has not received any further instructions from the Minister to effect payment.

[19] Before us, the main thrust of the contention of the defendant's learned counsel was that the High Court fell into error in failing to consider and recognise that the second third party had received all the benefits of the acts done by the defendant, that is to say, media bookings and services rendered by the plaintiff on behalf of the defendant and yet, the second third party had not paid fully for it. Learned counsel submitted that that the media services rendered did not benefit the defendant in any manner whatsoever, as the defendant was merely a media specialist agency, who worked on a commission basis. The defendant was not the end-user who benefited from the advertisements. Yet, the defendant was now liable to bear the entire costs of the media services and pay the plaintiff in full. Learned counsel added that there was a valid and binding agreement between the defendant and the second third party for the supply of media services.

[20] In refuting the contention of the defendant, learned counsel for the second third party took the position that there was no valid contract between the defendant and the second third party for the supply of media services. He argued that the treasury instructions on procurement relating to the defendant had not been complied with and previous payments to the defendant were made due to express instructions by the then Minister; if not for the Minister's instructions, payments would not have been made to the defendant because the treasury instructions had not been complied with. As such, he argued, payments cannot be lawfully made to the defendant.

[21] We had given our utmost consideration of the submissions of both sides but we found ourselves quite unable to agree with the submissions of learned counsel for the second third party. Our reasons now follow.

- A [22] Now, on the issue of the existence of a contractual relationship between the defendant and the second third party, it is important to note that the second third party had agreed to the media plans (see pp 1017–1020, Vol 2(5) of the appeal record), which were proposed by the defendant. The second third party is a statutory body established under the provisions of the National Sports Council of Malaysia Act 1971 (‘Act 29’). We should add the second third party has the power to enter into any contract (see s 4(2)(g) of Act 29). As can be seen these media plans were addressed to the second third party. The then Director General of the second third party, Dato’ Dr Ramlan bin Abd Aziz, (‘TP2(1)’) had signed and thereby approved these media plans on behalf of the second third party. The defendant’s Chief Executive Officer, Choy Lup Soon (DW4), confirmed this. Evidence was also led that the then Minister directed TP2(1) at the relevant time to sign the media plans.
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- D [23] As it turned out, the second third party had received the benefits of the media services rendered by the plaintiff on behalf of the defendant. The second third party’s witness, Dato’ Chek Zolkples bin Embong, (‘TP2(2)’) admitted paying the defendant on the invoices sent by it on instructions of the Minister. On top of that, the second third party’s witness Abdul Rashid bin Yaakub, (‘TP2(3)’) who was at the material time the Pengarah Bahagian Khidmat Pengurusan, confirmed that the second third party had paid around RM9m to the defendant. Thus, there was acceptance on the part of the second third party by way of performance.
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- F [24] The second third party knew that work was carried out in terms of the media services and there were never any objections from the second third party of the services provided. The second third party had accordingly made payments to the defendant for the media services provided. In *Fitzpatrick Contractors Ltd v Tyco Fire and Integrated Solutions (UK) Ltd* [2008] EWHC 1301 (TCC), the court quoted with approval the remarks of Steyn LJ, in *Trentham (G Percy) v Archital Luxfer Ltd* [1993] 1 Lloyd’s Rep 25; [1993] 63 BLR 44; [1992] BLM (December) 5 (CA) when he said, ‘that the fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often be difficult to submit that the contract was void for vagueness or uncertainty. Specifically, the fact that the transaction was executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised as inessential’.
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- I [25] In this regard, s 8 of the Contracts Act 1950 provides that performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal. The defendant acted in good faith and performed the contract. There has been no evidence led to show that the defendant acted illegally or

dishonestly in the commercial dealing between the parties.

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[26] For those reasons, the learned High Court judge fell into error and erred in law when he decided that there was no valid contract between the defendant and the second third party. This indicates a lack of judicial appreciation on the part of the learned High Court judge resulting in the defendant being prejudiced. In our judgment, there was a serious error warranting appellate intervention.

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[27] We now need to turn our attention to the contention of learned counsel for the second third party to the effect that the procedures under the treasury instructions relating to procurement had not been complied with; as such, payments cannot be lawfully made to the defendant.

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[28] In the first place, the second third party never pleaded in its defence that there was a breach of treasury instructions. It was also never pleaded that as a result of such breach, the contract was invalidated. It is a well settled legal principle that the court should not decide on an issue that was not pleaded by the parties as had been decided in *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; [1990] 1 CLJ (Rep) 330 where the Supreme Court cited *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 and agreed with the following passage of Sharma J which stated:

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The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact; it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

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[29] In our judgment, the issue of treasury instructions is an internal matter of the second third party and hence the non-compliance by the second third party, if any, bears no bearing on the contractual obligation of the parties (see *Macrotac Enterprise & Ors v Pengarah Pendidikan Negeri Selangor* [2009] MLJU 1262; [2010] 8 CLJ 592). Failure on the part of second third party to comply with the treasury instructions did not in any manner invalidate a contract that the defendant had entered into; the treasury instructions could not possibly bind the defendant (see *Pengarah Pelajaran Wilayah Persekutuan & Ors v Loot Ting Yee* [1982] 1 MLJ 68).

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[30] More important, it was never proven during the trial that the defendant was aware of any breach of the provisions of the treasury instructions. As submitted by learned counsel for the defendant, there is no reason for the defendant to think that the second third party had not complied with its own

A internal procedures on payment when in fact the second third party had been making consistent payments to the defendant from June 2007 to February 2009.

B [31] It is for all these reasons that we had allowed the defendant's appeal with no order as to costs against the second third party by setting aside the order of the High Court in so far as the second third party was concerned.

C [32] Accordingly, judgment was entered against the second third party as prayed in para 5(a) and (c) of the defendant's amended statement of claim against the third parties.

[33] We further ordered that the deposit to be refunded to the defendant.

D *Defendant's appeal allowed with no order as to costs against second third party.*

Reported by Kanesh Sundrum

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